JD(SF)-44-15
Denver, Colorado

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

KING SOOPERS, INC.,

and Case 27-CA-129598

WENDY GEASLIN,
an Individual.

Isabel C. Saveland, Esq.,
Jose Rojas, Esq.,
for the General Counsel.
Raymond M. Deeny, Esq.,
Jonathon Watson, Esq.,
for Respondent.

DECISION

STATEMENT OF THE CASE

AMITA BAMAN TRACY, Administrative Law Judge. This case was tried in Denver, Colorado, on August 11–12, 2015. Wendy Geaslin (Geaslin or Charging Party) filed the charge on May 29, 2014, and the first amended charge on August 18, 2014, and the General Counsel issued the complaint on October 31, 2014,[1] which was amended twice at the hearing. King Soopers, Inc. (King Soopers or Respondent) filed a timely answer.

The complaint and amended complaint allege that Respondent violated Section 8(a)(1) of the National Labor Relations Act (the Act) when it interrogated Geaslin in March; and violated Section 8(a)(3) and (1) of the Act when it suspended Geaslin on May 9 and 14, and terminated Geaslin on May 21.

[1] All dates are 2014 unless otherwise indicated.

On the entire record,[2] including my observation of the demeanor of the witnesses,[3] and after considering the briefs filed by the General Counsel and Respondent,[4] I make the following

FINDINGS OF FACT

I. JURISDICTION AND LABOR ORGANIZATION INVOLVED

King Soopers, Inc., a Colorado corporation, is engaged in the business of operating retail grocery stores with multiple facilities including a facility located at 1331 Speer Boulevard, Denver, Colorado 80204 (Store #1), where it annually derived gross revenues in excess of $500,000 and purchased and received goods valued in excess of $5000 directly from points outside of the State of Colorado. Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and that the United Food and Commercial Workers Union, Local 7 (Union) is a labor organization within the meaning of Section 2(5) of the Act.

Based on the above, I find that these allegations affect commerce and that the Board has jurisdiction of this case, pursuant to Section 10(a) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Background

Respondent operates several retail grocery stores in Colorado, including Store #1 in Denver. Respondent admits, and I find that Theresa Pelo (Pelo), store manager; Lisa Panzarella (Panzarella), assistant store manager; and Roxandra Barbos (Barbos), manager, are supervisors within the meaning of Section 2(11) of the Act and agents within the meaning of Section 2(13) of the Act. A variety of employees, or associates, work for Respondent including deli clerks, checkers, bakery clerks, and coffee clerks (baristas).

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[2] The transcripts in this case are generally accurate, but I make the following corrections to the record: Transcript (Tr.) 16, Line (L.) 14–15: the speaker is Mr. Deeny, not Judge Tracy; Tr. 18, L. 24: "hear" should be "here"; Tr. 37, L. 2, Tr. 38, L. 24: "Spear" should be "Speer"; Tr. 46, L. 2: "Oaky" should be "Okay"; Tr. 66, L. 1: sentence should end with a period, not a question mark; Tr. 70, L. 2: "set" should be "sack"; Tr. 132, L. 19: "and" should be "an"; Tr. 164, L. 9: "as" should be "was"; Tr. 171, L. 7: "whey" should be "why"; Tr. 211, L. 3: "further lefts" should be "further left"; Tr. 269, L. 9: "cute" should be "cut"; Tr. 269, L. 21-22, Tr. 270, L. 4: "Latice" should be "Latrice"; Tr. 292, L. 25: "Gleason" should be "Geaslin"; Tr. 293, L. 20: "Kin" should be "King"; Tr. 309, L. 19: "fi" should be "if".

In addition, Respondent notes that witness Panzarella's name is misspelled in the index: Tr. 3: "Pandearella" should be "Panzarella." Furthermore, throughout the transcript, Panzarella's name spelling should be corrected as well.

[3] Although I have included citations to the record to highlight particular testimony or exhibits, my findings and conclusions are not based solely on those specific record citations, but rather on my review and consideration of the entire record for this case. I further note that my findings of fact encompass the credible testimony and evidence presented at trial, as well as logical inferences drawn therefrom.

[4] Other abbreviations used in this decision are as follows: "GC Exh." for General Counsel's exhibit; "R. Exh." for Respondent's exhibit; "Jt. Exh." for Joint Exhibit; "GC Br." for the General Counsel's brief; and "R. Br." for the Respondent's brief.

Respondent's employee handbook details standards of conduct expected and provides various actions which would warrant discipline including termination (Jt. Exh. 3). Respondent's standards of conduct state that employees are expected to behave in a professional manner when interacting with his or her fellow associates, management, and customers. As defined by Respondent, insubordination, or the failure to follow management directive, is considered misconduct, and any words or deeds that are in violation of the policy will subject the employee to discipline up to and including termination; insubordination includes the willful or intentional failure by an employee to obey a lawful and reasonable verbal or written instruction of the supervisor or manager which relates to the employee's job function.

For many years, the Union has been a bargaining agent for units of Respondent's Denver area employees, and the parties have signed successive collective-bargaining agreements. The most recent collective-bargaining agreement covering the meat employees, which includes baristas who work in the Starbucks' kiosks within the stores, was effective from May 13, 2012, through September 12, 2015 (the meat contract). The collective-bargaining agreement covering the retail employees (clerks), which includes bakery employees, was effective during the same time period as the meat contract (the retail contract).

Article 1 of the meat contract covers the work to be performed by the employees (Jt. Exh. 1). Article 2 of the retail contract covers the work to be performed by the retail employees. Danny Craine (Craine), a union representative, and Geaslin testified that they interpret both collective-bargaining agreements to prevent employees from performing work outside of their assigned department; in other words, both collective-bargaining agreements state that the employees are limited to the duties assigned for their position. For example, baristas who work in the Starbucks' kiosk are not expected to provide Respondent's bakery items as samples to customers; the baristas should only provide samples of Starbucks' pastries (Tr. 155).[5] Nevertheless, the Union has not filed a grievance on this issue.

Employees abide by the same rules and procedures of Respondent including being respectful and not insubordinate. Furthermore, the grievance procedure is the same in both collective bargaining agreements. The first step of the grievance process includes speaking at the store level with the manager, and if not resolved, then the second step includes filing a written grievance with Respondent's labor relations office. Thereafter, the Union's executive committee meets and determines whether to arbitrate the grievance. A Union member may appeal the decision not to arbitrate to the Executive Board with their appeal determination final.

B. Geaslin's Employment with Respondent

Geaslin began working for Respondent on August 19, 2009, until her termination on May 21, 2014.[6] When she was terminated, she had been working as a barista for the prior year in the

[5] Whether Danny Craine (Craine) and Wendy Geaslin's (Geaslin) interpretation of the collective-bargaining agreement is legally sound is not before me.

[6] Overall, Geaslin testified in a calm demeanor but did become understandably agitated under Respondent's argumentative cross-examination. Despite this tough cross-examination, Geaslin's testimony did not waver. Geaslin testified generally consistently, and her testimony was corroborated by her Board affidavit. However, as discussed further, there are some inconsistencies in the details of what

Starbucks' kiosk of Store #1. As a barista, Geaslin prepared and served coffee beverages as well as the Starbucks' pastries sold within the kiosk (Jt. Exh. 1 at Letter of Agreement #26; Tr. 40). The opening shift brews the coffee and puts pastries in the pastry case. The mid-day shift restocks items within the kiosk. The closing shift pulls pastries from the freezer and restocks items for the opening shift. Prior to her to suspensions and termination at issue, Geaslin had been disciplined at Respondents' Store #29 for failing to take her lunch break at the appropriate time.[7] In accordance with article 24 of the meat contract, employees should take a lunch break "at approximately the middle of his workday" (Jt. Exh. 1).

1. March 2014: Alleged interrogation of Geaslin by Pelo

On an unspecified day in March, Geaslin arrived at work for the morning shift and discovered that the night-shift employee failed to restock items and defrost the pastries for Geaslin to place in the display case (Tr. 42). Later that day Geaslin complained to coworker Latrice Jackson (Jackson), a produce clerk, about the Starbucks' employees not being able to complete their own duties, such as restocking, due in part to having to help Respondent's bakery department with sampling its own bakery products (Tr. 44, 75).[8] Unbeknownst to Geaslin, Jackson also served as one of two union stewards at Store #1.

Respondent offered testimony from Panzarella and Pelo regarding another possible incident with Geaslin in March. Panzarella asked Geaslin to provide samples of King Sooper's bakery products to customers. Geaslin disagreed with Panzarella regarding the propriety of performing the task because the Starbucks employees had a "hard enough time getting our own samples cut and out for sampling without having to do the bakery's products," but ultimately handed out samples of the bakery product (Tr. 125). Geaslin spoke to Jackson about the situation, and Jackson, in turn, "complained" to Panzarella about her work directive (Tr. 226). Jackson advised Geaslin to do what upper management tells her to do. Respondent did not discipline Geaslin for initially refusing to perform the task. Panzarella testified that she told Pelo that Geaslin complained to Jackson about sampling (Tr. 238).

Sometime in March, thereafter, Pelo approached Geaslin, stating, "I wasn't going to ask you, but did you really complain to the Union about having to sample out stuff for the bakery?" (Tr. 44, 79).[9] Geaslin responded that she had not spoken to the Union; at the time, Geaslin was

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occurred, and in some instances I cannot credit Geaslin.

[7] Prior to working at Store #1, Geaslin worked at Store #29 in a similar position. While at Store #29, Respondent in May 2011 issued Geaslin a written warning for unsatisfactory job performance and violation of company policy, rule or procedure when she failed to take a lunch (R. Exh. 1). One month later Geaslin failed to take a lunch again, and Respondent issued her a 1-day suspension; Respondent failed to schedule the date for her suspension, and thus she never actually served her suspension (R. Exh. 2).

[8] Latrice Jackson (Jackson) did not testify.

[9] Theresa Pelo (Pelo) denied speaking to Geaslin about going to the Union with her complaint (Tr. 269–270). In response to the question of whether Pelo interrogated Geaslin about this incident, Pelo testified, "No, there would be no reason to. I know that Lisa and Latice [sic] had already addressed it" (Tr. 270). However, Geaslin completed the assignment from Lisa Panzarella (Panzarella) before she even spoke to Jackson; there was nothing to "address" by Panzarella and Jackson as claimed by Pelo. As stated previously, I found Geaslin to be a generally credible witness, and it seems unlikely she would

unaware that Jackson was a union steward (Tr. 46, 142). Pelo then stated, "Well, that's not the truth. You did complain to them and I don't like that." (Tr. 46).

2. May 9, 2014: Respondent's first suspension of Geaslin

On Friday, May 9, Respondent scheduled Geaslin to work from 5:30 a.m., to 2 p.m. Store #1 was extremely busy that day because it was the Friday before the Mother's Day holiday. Between 11:30 and 11:45 a.m., Pelo used the intercom to call for employee assistance in the front end of the store, both to check out customers and to bag or sack groceries, because queues were quickly forming at the check stands. Pelo specifically called for employee assistance from Starbucks, which is not a typical request but she did so because of the store's volume of customers (Tr. 48). Upon hearing this request, Geaslin looked at her coworker with "amazement" because they had never been asked to sack groceries (Tr. 48).[10]

Geaslin finished with her Starbucks' customers, removed her apron, and then stepped out of the kiosk (Tr. 48). Pelo, thinking that Geaslin came to assist, testified that she immediately thanked Geaslin for coming over to help bag groceries.[11] Pelo, who was standing behind self-checkout, was 30 to 50 feet from Geaslin. Geaslin then walked up to her, put her hand on her shoulder, and tried to tell her she was going to take her lunch since she needed to leave at 2 p.m. that day (Tr. 49, 110, 116).[12]

Before Geaslin could finish her statement, Pelo interjected that she was the store manager and Geaslin needed to do what she said. Pelo told Geaslin not to worry about her lunch, that she would get her lunch and to go ahead and sack groceries. Geaslin responded asking Pelo if technically she should be performing these duties since she belonged to a different bargaining unit or "different Union" (Tr. 49, 116, 143). Pelo told Geaslin that she was the store manager, and Geaslin needed to bag groceries. By this point in the conversation, both Pelo and Geaslin's voices were raised. Geaslin turned to go sack groceries, and while doing so she raised her hands in the air and said, "Well, all I was doing was asking about my lunch" (Tr. 50).[13] Geaslin did not

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fabricate such an interaction with Pelo. Thus, I do not credit Pelo's testimony that she did not interrogate Geaslin.

[10] Angelica Eastburn (Eastburn), an assistant deli manager, testified that she had never been asked to bag groceries as deli employee; it was unusual for employees other than the produce, bakery, and grocery employees to bag groceries (Tr. 215).

[11] Geaslin testified that Pelo yelled, "Where do you think you're going?" (Tr. 48). I decline to credit Geaslin's testimony on this point. Two other witnesses, one of whom is current bargaining unit employee Eastburn, testified that Pelo thanked Geaslin, rather than yelling at Geaslin in an abrasive manger. Thus, I credit Pelo's testimony on this point. Generally, under Board law, current employees are likely to be particularly reliable because these witnesses are testifying adversely to their pecuniary interests. *Flexsteel Industries*, 316 NLRB 745 (1995), affd. mem. 83 F.3d 419 (5th Cir. 1996).

[12] Based upon Respondent's rule to take a lunch break midway through the shift, Geaslin's lunchtime should have been earlier that morning, perhaps between 10 and 11 a.m., rather than between 11:30 and noon (Tr. 87). Nevertheless, Respondent did not discipline Geaslin for this incorrect lunchtime nor did they discuss with her the violation of the rule.

[13] Geaslin consistently and credibly testified that she attempted to bag the groceries but could not even begin the task because Pelo called her back to talk with her. Throughout Respondent's rigorous cross-examination of Geaslin, she repeated that she tried to bag groceries. At one point, Geaslin stated, "and if people would listen to me, I tried to go and sack the groceries" (Tr. 136–137). Geaslin's

refuse to bag the groceries but also did not affirmatively say she would bag them. Instead, she turned and walked towards the check stands to bag groceries while also physically demonstrating her frustration with Pelo by raising her arms in the air.

In reaction to this gesture, Pelo called Geaslin back over to her stating, "You get back here. We need to talk" (Tr. 50). Geaslin walked back and agreed to talk with Pelo, suggesting that they speak in Pelo's office after their voices became raised.[14] The discussion on the store floor lasted only a few minutes.

Angelica Eastburn (Eastburn), the assistant deli manager who also in the same bargaining unit as Geaslin and also a current employee of Respondent, witnessed some portion of this exchange as she walked back from the time clock.[15] The exchange between Pelo and Geaslin was at a sufficient volume that Eastburn could hear them over the customers gathered in the front of the store. Eastburn did not see or hear whether Geaslin agreed or disagreed to bag groceries. Eastburn accompanied them to the manager's office.

Once Geaslin, Pelo, and Eastburn entered the office, Pelo began saying that Geaslin refused to bag groceries, and instead was going to take a lunch. Geaslin responded that Pelo was not telling the truth and that she was walking towards where she needed to bag groceries but Pelo called her back. Geaslin also stated that she never said she would not sack groceries (Tr. 54). Geaslin explained that she only inquired about her lunch break and whether the Union's collective-bargaining agreement permitted her to perform those job duties (Tr. 51–52). They

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unwavering testimony, despite Respondent's attempt to confuse her testimony, convinced me that her testimony on this point should be credited, not Pelo's testimony. Pelo testified that after Geaslin left the Starbucks' kiosk, she immediately came towards her rather than attempt to sign out for lunch which demonstrates that she was not ignoring Pelo's request but rather wanted to let her know she still needed to take her lunch break. Both Pelo and Geaslin testified that Geaslin asserted her belief that the collective-bargaining agreement precluded her from bagging groceries but Pelo claimed that Geaslin refused to bag groceries. Geaslin's past behavior supports her testimony—in March Geaslin questioned the non-Starbucks related tasks assigned to her and her coworker, but ultimately performed the task. Geaslin's May behavior is consistent, and thus her version of events will be credited.

[14] Roxandra Barbos (Barbos), a current assistant manager at Respondent, testified that she witnessed less than 1 minute of the exchange between Pelo and Geaslin before she headed to a meeting. Barbos testified that she only heard Pelo thanking Geaslin for coming over to help bag groceries, and Geaslin responding negatively. She did not witness the remainder of the incident, and thus, I decline to rely on her testimony for the May 9 incident.

[15] Eastburn testified that she overheard Pelo say, "Thank you for coming to help sack" (Tr. 207–208). Geaslin responded, "I'm on my way to take my lunch." Eastburn testified that she could not remember if she heard Geaslin objecting to sacking groceries. For the critical portion of the exchange, Eastburn could not recall if Geaslin objected to bagging groceries or affirmatively agreeing to sack groceries (Tr. 208–209). Eastburn gave generally sincere testimony but ultimately her testimony was not completely reliable due to her lack of recollection. Respondent needed to use her statement given proximate to the events in May to refresh her memory. Eastburn could not testify about the conversation between Pelo and Geaslin in the manager's office without her statement to recall her testimony. However, her statement, which I credit since it was given closer in time to the events and issue, indicates that both Pelo and Geaslin discussed the collective-bargaining agreement, and her statement is silent as to whether Geaslin refused to bag groceries (Tr. 218). This omission from Eastburn's statement supports Geaslin's testimony that she did not refuse to bag groceries.

argued back and forth. Both Geaslin and Pelo's voices were raised; Geaslin admitted she was agitated (Tr. 64).[16] Pelo then told Geaslin to clock out because she would be on a 5-day suspension.

During this meeting, Geaslin was emotional but did not use any profanity, threaten, or physically touch Pelo. As Geaslin left the meeting, Pelo told her the suspension would be without pay, and Geaslin responded, "Oh waa", mimicking a baby's cry (Tr. 55). The meeting lasted 10 to 20 minutes. Geaslin clocked out at 12:05 p.m. (R. Exh. 5). She left the store on her own accord and was not escorted out by security guards.

After the meeting, Pelo spoke with Labor Relations Manager Stephanie Bouknight (Bouknight). Bouknight recommended immediate termination for insubordination but Pelo wanted to give Geaslin another chance. Geaslin called Craine, as her union representative, to inform him of what occurred. She told him that she did not refuse Pelo's direct order; she only questioned whether she should be performing the work since it could be a violation of the collective-bargaining agreement (Tr. 181).

3. May 14, 2014: Respondent's second suspension of Geaslin

On Wednesday, May 14, Geaslin along with her Union Representative Craine met with Pelo in the manager's office at Store #1 to discuss her suspension from the prior week.[17] Panzarella and Barbos were at the meeting for most of the time. The meeting occurred between 10 and 11 a.m., behind a closed door.

Pelo started the meeting by telling Geaslin she would let her work again but then started talking to Craine about Geaslin's refusal to bag groceries on May 9. In response to this exchange, Geaslin made a surprised look at Craine because she was in disbelief that Pelo continued to make alleged false statements. Her surprised expression included raising her arms in the air (Tr. 132, 182). Pelo stood up and said, "Do you see the disrespect she shows me? She is making faces at me and being very disrespectful" (Tr. 57). Craine intervened by saying that Geaslin merely made a facial expression, and Pelo responded, "No, she is making faces at me and being disrespectful."

Craine testified that Pelo admitted that Geaslin's duties did not include bagging groceries but that she was shorthanded and needed assistance, and Geaslin needed to respect her as her boss. Meanwhile, Geaslin told Pelo that she could have asked her to bag groceries without yelling at her, and stated that she never refused to bag the groceries.

[16] Pelo testified that during the May 9 meeting Geaslin spoke about not needing to respect Pelo and do what she was asked to do, and Pelo responded by telling Geaslin that she must follow her orders (Tr. 275). Again, I cannot credit Pelo's testimony. Eastburn, who is a current employee testifying against her own pecuniary interests, did not testify about any discussion of respect by either Pelo or Geaslin during the May 9 meeting nor was this testimony elicited from her statement. Instead the credited evidence shows that the exchange between Pelo and Geaslin regarding respect occurred during the May 14 meeting, not the May 9 meeting.

[17] Craine testified in a deliberate, calm manner; his tone measured, paused when thinking about his responses to the questions. Craine's testimony generally did not contradict the testimony of Geaslin but rather supplemented her testimony with his recollection of events.

This back and forth disagreement continued with both Pelo and Geaslin raising their voices, and Geaslin interrupting Pelo. At one point during the meeting, Geaslin testified that she said to Pelo, "If you want people to respect you, maybe you should try to respect them" (Tr. 57, 99). Pelo responded that she did not need to respect Geaslin.[18] Craine felt that Geaslin became more agitated or "aggressive" during this meeting (Tr. 81). He explained that Geaslin's tone of voice became louder, and she was gesturing frequently with her hands but she was not physically leaning forward towards Pelo. Pelo remained calmer than Geaslin, but her face began to turn red.

Because the situation was getting heated, Craine decided to take Geaslin out of the room for a break.[19] Craine led Geaslin out of the room and into the break room. Craine advised Geaslin to calm down, to not raise her voice and to give Pelo more respect. They went back into the meeting. After returning to the meeting, Geaslin remained subdued. Pelo told Geaslin and Craine that Geaslin would be suspended for misconduct.[20] Craine told Pelo that Geaslin was "just defending herself," but Pelo said that Geaslin was being rude and making faces at her (Tr. 160).

During this meeting before she first left the room with Craine, Geaslin was upset and agitated that Pelo was not telling the truth (Tr. 60). Geaslin spoke with a "heightened" voice and gestured with her hands but did not use any profanity, did not threaten anyone, and did not approach Pelo or the other managers (Tr. 60–61). Geaslin was emotional and defensive with the volume on her voice elevated but she was not yelling. After she came back into the room with Craine, Geaslin's demeanor changed to being subdued and not speaking (Tr. 61). Throughout this meeting, Geaslin did not use profanity or threaten Pelo or any other manager physically or

[18] Around the time when Geaslin filed her unfair labor practice charge with the Board, she noted in a handwritten document that what Pelo wrote on her termination paperwork was not true—"I did say that if she wanted people to respect her she should give respect! Not I was not going to respect her because she didn't respect me" (R. Exh. 3; Tr. 92). In contrast, Craine testified that Geaslin told Pelo that Pelo should earn her respect. On this point, I do not credit Craine's testimony but rather I credit Geaslin's testimony. Geaslin's testimony on what she relayed to Pelo regarding the issue of respect is corroborated by her statement to the Board. I also discredit the testimony of Panzarella on this issue. Panzarella testified that Pelo told Geaslin that she was being disrespectful, and Geaslin responded that she did not need to respect Pelo (Tr. 232). Again, I credit the testimony of Geaslin whose testimony was corroborated by her notes closest to the date the meeting occurred.

[19] Pelo and Craine testified that Pelo asked Craine to take Geaslin out of the room. Based upon the entire record it seems more likely than not that Craine decided to take Geaslin out of the room, rather than Pelo making this decision. Geaslin clearly became upset during this meeting, and it seems more likely for Craine to bring Geaslin out of the meeting to calm her down.

[20] Geaslin testified that Pelo left the room to consult with her manager after she said she would terminate Geaslin and after Craine reminded her that she could not simply terminate Geaslin. I cannot credit Geaslin on this portion of her testimony. Respondent's managers typically consult with labor relations prior to disciplining employees (Tr. 184), and it seems unlikely Pelo would need to be reminded by Craine of her responsibility. In contrast, Craine testified that after they returned to the room, Pelo stated she called her manager and decided to leave Geaslin in suspension status (Tr. 160). Furthermore, Pelo testified that after she told Geaslin she would be suspending her again, she told Geaslin and Craine that she would think about whether she would retain Geaslin (Tr. 279). Craine's version of events seems more likely and I credit his testimony.

verbally (Tr. 160).[21] When Geaslin left the meeting and the store, she left on her own accord without an escort by security guards.

4. May 21, 2014: Respondent's termination of Geaslin

On Wednesday, May 21, Pelo met with Geaslin and Craine in the management office. Panzarella also attended the meeting as a management witness. Pelo terminated Geaslin for misconduct and being disrespectful (Tr. 62). Pelo told Geaslin and Craine that "what happened at the prior meeting was terrible" and "she had never been treated like that before" (Tr. 162). Pelo elaborated that she was terminating Geaslin for gross misconduct during the May 14 meeting when Geaslin talked back to her, made faces at her, and made an inappropriate comment about respect (Tr. 163). Craine asked several more questions regarding the May 9 incident, and Pelo continued to allege that Geaslin refused to bag groceries. Geaslin did not speak at this meeting. Again, no security guards were present for the meeting and Geaslin was not escorted out of the store by any security guards.

Pelo provided Geaslin with her termination paperwork. The paperwork, dated May 21, indicated that Geaslin was terminated for misconduct and being disrespectful to her manager. Pelo wrote,

> On 5-14-14 Wendy [Geaslin] + the union met with me to discuss an incident that had occurred the prior week. During this meeting Wendy [Geaslin] was very obstinate + was being very disrespectful by making faces + saying inappropriate things. She was warned to stop this behavior when she stated she did not have to respect me until I respected her or earned her respect. I am terminating her at this time for gross misconduct.

(Jt. Exh. 4.) Panzarella signed this paperwork as well. Craine considered this meeting to be the first step grievance meeting.

[21] In contrast, Panzarella, Barbos and Pelo testified that Geaslin kept moving forward or "lunging" in her chair, and clenching and baring her teeth and shaking her hands and fists (Tr. 250–251). Panzarella testified that Geaslin was agitated and angry, her face turning red and she became vocal and loud (Tr. 230). Pelo, in response, scooted back from the desk at which she sat facing Geaslin. Barbos also stated that Geaslin rolled her eyes at Pelo, and lunged forward 2 times. Her face was also flushed. Pelo said to Geaslin, "What are you doing? Why are you making faces at me?" Both Panzarella and Barbos expressed concern about Geaslin's demeanor. I do not credit Panzarella, Barbos and Pelo's description of Geaslin's actions during the meeting. Their version of events seemed exaggerated and hyperbolic; if they truly were concerned about Geaslin's behavior, then one would expect an aggressive response such as calling security guards to escort Geaslin from the premises.

Furthermore, in a Colorado Department of Labor and Employment hearing, held on November 10, Panzarella testified as follows in response to the hearing officer's question as to why she believed Geaslin was angry: "She was sitting and clenching her fists and making real nasty faces. She was red […] Wendy kept getting louder and louder, and Theresa had asked her to calm down" (Tr. 239). Panzarella failed to mention in her prior testimony that Geaslin allegedly lunged toward Pelo. This significant omission from her prior testimony clearly undermines Panzarella's testimony.

5. The Union's appeal of Geaslin's suspensions and termination

The Union filed a grievance on behalf of Geaslin contesting her suspension on May 9 and termination on May 21, and the May 21 meeting was Step 1 of the grievance process (R. Exh. 4). The Union did not file a grievance concerning Starbucks' baristas needing to sample Respondent's bakery items (Tr. 75). The Union also did not file a grievance concerning Pelo's order to Geaslin to bag groceries. Ultimately according to what Geaslin understood and speculated, the Union declined to arbitrate the claim because they felt that Geaslin should have bagged groceries without asking about her lunch or her contractual rights (R. Exh. 10; Tr. 134).[22] Craine testified that he thought the Union declined to arbitrate Geaslin's discipline and terminations because they felt they could lose (Tr. 177–178).[23]

III. Discussion and Analysis

A. Procedural Issues

1. General Counsel's amendments to the complaint

Respondent objected to the General Counsel's two motions to amend the complaint at the hearing to include search-for-work and work-related expenses to the make whole remedy, and to include an allegation of interrogation of Geaslin's union activity by Pelo in March 2014. I overruled the objections, and allowed the amendments. Respondent continues to object in its posthearing brief. In *Rogan Bros. Sanitation, Inc.*, 362 NLRB No. 61, slip op. at 3 fn. 8 (2015), the Board stated that the administrative law judge has wide discretion to grant or deny motions to amend complaints under Section 102.17 of the Board's Rules and should consider the following when permitting an amendment to the complaint during the hearing: (1) whether there was surprise or lack of notice, (2) whether there was a valid excuse for the delay in moving to amend, and (3) whether the matter was fully litigated.

Motion to Amend the Complaint: Make-Whole Remedy

With regard to the make-whole remedy, the General Counsel requests Respondent to reimburse Geaslin for "all search-for-work and work-related expenses regardless of whether the discriminatee received interim earnings in excess of these expenses, or at all, during any given quarter, or during the overall backpay period" (GC Exh. 1(ee)). Upon notice of the intent to amend the complaint at the hearing with this specific remedy, Respondent submitted a subpoena

[22] No representatives from the Union's Executive Committee testified to explain why they declined to arbitrate Geaslin's grievance. The Executive Committee does not inform the member or her union representative why they decline to take a grievance to arbitration (Tr. 177–178).

[23] Respondent, in its brief, argues that "attached" to Craine's Board affidavit were notes belonging to another union representative who attended the Step 2 grievance meeting, and Respondent should have been able to review those notes (R. Br. at 15, fn. 12). I disagree. The union representative to whom these alleged notes belong to did not testify, and Craine's affidavit stated, "I provided the notes taken by the Union representative" to the General Counsel (Tr. 169). These notes cannot be considered a prior statement given by Craine, and thus would not need to be disclosed by the General Counsel to Respondent. See Board Rule Sec. 102.118.

duces tecum to the Charging Party essentially requesting evidence of any work-related search expenses. In response, the General Counsel filed a petition to revoke. At the hearing, I granted the General Counsel's motion to amend the complaint and granted the petition to revoke (Tr. 12–18).

Respondent argues that it was surprised by the amendment, and needed the subpoenaed documents to fully litigate the matter. The General Counsel argued in its brief as to why these expenses should be reimbursed, but Respondent failed to address in its brief, despite my invitation to do so, why these expenses should not be authorized despite its objection to the amendment of the complaint (Tr. 18). Instead Respondent focused on my denial of its subpoena duces tecum. Respondent argues that to determine whether such a remedy is warranted, it needs the amount of the interim earnings and Geaslin's efforts to seek interim employment (R. Br. at 51). I disagree. The issue of what specific expenses were actually incurred by Geaslin should be addressed during the compliance stage of these proceedings, and not before, if such a remedy is authorized. Hence, I granted the General Counsel's petition to revoke. Respondent's objection to the amendment and my subsequent granting of the motion to amend the complaint opened the door for Respondent to argue in its posthearing brief why the remedy is not appropriate. Rather than argues these merits, Respondent essentially argues that it cannot make an argument because it does not know *how much* these expenses are—Respondent misses the point. See *Katch Kan USA, LLC*, 362 NLRB No. 162, slip op at 1 fn. 2 (2015) (Board declines to order relief of all search-for-work and work-related expenses because the parties did not fully brief these issues).

Reviewing the General Counsel's arguments on this issue, I believe that the General Counsel raises strong arguments as to why these work-related search expenses should be included as part of a make whole remedy (GC Br. at 41–44). Similar to the Board's actions in *Don Chavas, LLC*, 361 NLRB No. 10 at 3 (2014), the General Counsel argues that the Board should revise the existing rule regarding search-for-work and work-related expenses to ensure that "victims of unlawful conduct are actually made whole." The General Counsel further states, "these expenses should be calculated separately from taxable net backpay and should be paid separately, in the payroll period when incurred, with daily compounded interest charged in these amounts," citing *Jackson Hospital Corp.*, 356 NLRB No. 8, slip op. at 1 (2010). However, the revision of this remedy must come from the Board, and accordingly, I decline to include the requested remedy in my recommended order. See also *East Market Restaurant, Inc.*, 362 NLRB No. 143, slip op. at 5 fn. 5 (2015)

Motion to Amend the Complaint: Alleged Interrogation

With regard to the interrogation allegation, Respondent via the first amended charge, dated August 18, 2014, was put on notice of the alleged interrogation of the Charging Party, and cannot claim lack of notice. Certainly, the General Counsel should have included this allegation in its original complaint since the amended charge included this allegation which presumably was investigated. Nevertheless, such an oversight should not preclude an amendment. Finally, contrary to Respondent's argument (R. Br. at 18), Respondent was given an opportunity to fully litigate the allegation when it cross-examined Geaslin regarding the alleged interrogation and questioned its witnesses (Tr. 68–80). See *Amalgamated Transit Local 1498 (Jefferson Partners)*, 360 NLRB No. 96, slip op. at 2 fn. 7 (2014) (mid-hearing complaint amendment properly

granted, as issue "was fully litigated from that point forward"). Hence, the amendment to the complaint is appropriate.

2. Deferral argument

Respondent contends that "this case should be deferred to the [collective bargaining agreement's] grievance and arbitration process" (R. Br. at 24–27). The General Counsel argues that deferral is not appropriate (GC Br. at 37–39). As set forth below, I find that deferral is not appropriate.

The Board in *United Technologies Corp.*, 268 NLRB 557, 558 (1984), and *Collyer Insulated Wire*, 192 NLRB 837, 842 (1971), articulated that deferral of an unfair labor practice charge to the parties' grievance procedure under the collective-bargaining agreement is appropriate when numerous factors are present.[24] Furthermore, the burden of proof lies with the party asserting deferral which in this instant is Respondent. See *Doctors' Hospital of Michigan*, 362 NLRB No. 149, slip op. at 13 (2015).

As a precondition of a *Collyer* deferral, the charging party should have the arbitral consideration of the grievance. *U.S. Postal Service*, 324 NLRB No. 129 (1997). In *U.S. Postal Service*, the union refused to process an employee's grievance to arbitration. The evidence failed to show that the union's refusal to arbitrate the grievance was unlawful or motivated to avoid deferral. In such a situation, deferral to arbitration is inappropriate. Likewise, the facts presented in this instance demonstrate that deferral would not be appropriate.

Here, on May 22, the Union by Craine filed a grievance regarding Geaslin's two 5-day suspensions and termination. Subsequently on October 20, the Union denied Geaslin's request to arbitrate her claim. Geaslin, who filed the May 29 unfair labor practice charge on her own behalf, did not withdraw the grievance, and in fact, appealed the decision to the Executive Board to re-evaluate its decision declining to arbitrate her grievance. The Union Executive Committee does not share the reasons behind its decision with the member or the steward, and the record only contains Craine and Geaslin's speculation as to why the Union declined to arbitrate her grievance. Geaslin has exhausted the grievance procedures. Geaslin does not have the power to arbitrate her own grievance, and I cannot compel the Union, who is not a party to these proceedings, to arbitrate Geaslin's grievance. Hence, deferral to arbitration is inappropriate.

Respondent argues that once the Union filed the grievance on behalf of Geaslin, Geaslin and the General Counsel should be precluded from proceeding with this Board case. Despite the

[24] These factors include: if the dispute arose within the confines of a long and productive collective-bargaining relationship; if there is no claim of employer animosity to employees' exercise of protected rights; if the parties' collective-bargaining agreement provides for arbitration of a very broad range of disputes; if the arbitration clause clearly encompasses the dispute at issue; if the employer asserts its willingness to utilize arbitration to resolve the dispute; and if the dispute is eminently well suited to resolution by arbitration. *United Technologies Corp.*, 268 NLRB 557, 558 (1984).

In *Babcock & Wilcox Construction Co.*, 361 NLRB No. 132 (2014), the Board made some modifications to the standards for deferral to arbitration, but stated that the new standard would be generally applied prospectively, and not to cases, such as this case, already pending at the time the decision was issued.

cases cited by Respondent, these cases can be distinguished from the facts presented here. In *General Dynamics Corp.*, a charging party filed grievances over his suspensions in accordance with his collective bargaining agreement. However, after pursuing the grievance through four of the five grievance steps but prior to arbitration, the charging party *voluntarily* withdrew the grievance and filed an unfair labor practice. The Board concluded that deferral was appropriate under *United Technologies* because there was no showing that the grievance-arbitration procedure was unfair or would produce a result repugnant to the Act and that to permit withdrawal from the grievance procedure would be contrary to *United Technologies.*

The situation presented here is directly on point with the Board's decision in *U.S. Postal Service*. Thus, I decline to defer this matter to arbitration.

B. Witness Credibility

As often happens in these cases, the testimony of the various witnesses differed as to what happened and what was said. The statement of facts is a compilation of credible and uncontradicted testimony. A credibility determination may rely on a variety of factors, including the context of the witness' testimony, the witness' demeanor, the weight of the respective evidence, established or admitted facts, inherent probabilities and reasonable inferences that may be drawn from the records as a whole. *Double D Construction Group*, 339 NLRB 303, 305 (2003); *Daikichi Sushi*, 335 NLRB 622, 623 (2001) (citing *Shen Automotive Dealership Group*, 321 NLRB 586, 589 (1996)), enfd. sub nom., 56 Fed. Appx. 516 (D.C. Cir. 2003); see also *Roosevelt Memorial Medical Center*, 348 NLRB 1016, 1022 (2006) (noting that an ALJ may draw an adverse inference from a party's failure to call a witness who may reasonably be assumed to be favorably disposed to a party, and who could reasonably be expected to corroborate its version of event, particularly when the witness is the party's agent). Credibility findings need not be all of all-or-nothing propositions—indeed, nothing is more common in all kinds of judicial decisions than to believe some, but not all, of a witness' testimony. *Daikichi Sushi*, supra.

Along with my credibility findings set forth above in the findings of fact, I found the testimony of Geaslin and Craine to be mostly credible despite a few minor contradictions. Despite Respondent's rigorous cross-examination, Geaslin consistently testified that she attempted to bag groceries but could not do so since Pelo told her to come back and talk to her. Furthermore, I credit Geaslin's testimony as to Pelo approaching her questioning if she complained to the Union about sampling bakery items. Geaslin's version of events leading up to the question posed by Pelo was corroborated by Panzarella's testimony; it is more likely than not that Pelo approached her with such as question. I also credit Geaslin's testimony as to her behavior and demeanor during the May 9 and 14 meetings with Pelo. Although Pelo's version of events during the May 14 meeting was corroborated by Panzarella and Barbos, I decline to credit the testimony of Pelo, Panzarella, and Barbos. Most significantly, if Geaslin posed such an imposing concern as expressed by all three managers, it seems nonsensical that they did not attempt to have Geaslin escorted from the premises or even to have security personnel attend the May 21 termination meeting. As such, I credit Geaslin's testimony.

Craine related the facts accurately, logically and to the best of his ability to do so. Craine's testimony was not exaggerated. Craine corroborated Geaslin's testimony regarding her

behavior and demeanor during the May 14 meeting. Craine offered that Geaslin's voice was getting louder and she was interrupting Pelo but that her facial expressions were mild compared to Pelo's over-the-top reaction. Thus, Craine testified without a hint of bias, and I credit most of his testimony.

Eastburn testified sincerely but could not recall significant details on which she was questioned. Thus, I decline to rely completely upon Eastburn's testimony except when it was corroborated by her statement. Significantly, Eastburn did not recall if Geaslin agreed or disagreed to bag the groceries, and her contemporaneous statement is silent on this critical issue.

In contrast, I cannot rely on most, if not all, of the testimony provided by Pelo, Panzarella and Barbos. Their testimony seemed generally unreliable and inconsistent with the details of the events. Pelo claims that Geaslin refused to bag the groceries. However, Eastburn could not recall whether Geaslin actually refused and Barbos only heard the beginning of the conversation. Furthermore, Geaslin's prior behavior of questioning her duties but ultimately performing those duties supports her version of events. Panzarella's testimony regarding Geaslin's behavior during the May 14 meeting was undermined by her Colorado Department of Labor and Employment hearing testimony given closer in time to the May incident where she failed to mention that Geaslin allegedly lunged at Pelo.

C. Geaslin Engaged in Protected, Concerted Activity

Before discussing whether Respondent violated the Act when allegedly interrogating, twice suspending and terminating Geaslin, I must first address the issue of whether Geaslin engaged in protected concerted activity when she questioned in March whether she should be sampling King Sooper's bakery products and complained about having to perform work for the bakery department at Respondent, and when she questioned in May whether she should be bagging groceries instead of taking her lunch break. Respondent argues that Geaslin's questioning in May was personal and individual, and the fact that the Union never filed a grievance on her behalf supporting her interpretation of the collective bargaining agreement demonstrates that her "protest" was not valid (R. Br. at 36–43).[25] I disagree with Respondent's argument; under Board precedent, Geaslin engaged in protected concerted activity in March and May.

Section 7 of the Act protects the right of employees to engage in "concerted activity" for the purpose of collective bargaining or other mutual aid or protection. For an employee's activity to be "concerted" the employee must be engaged with or on the authority of other employees and not solely on behalf of the employee herself. *Meyers Industries (Meyers I)*, 268 NLRB 493 (1984), revd. sub nom *Prill v. NLRB*, 755 F. 2d 941 (D.C. Cir. 1985), cert. denied 474 U.S. 948 (1985), on remand *Meyers Industries (Meyers II)*, 281 NLRB 882 (1986), affd. sub nom *Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987), cert. denied 487 U.S. 1205 (1988). The statute requires the activities under consideration to be "concerted" before they can be

[25] Neither Respondent nor the General Counsel address the issue of whether Geaslin engaged in protected concerted activity in March. As a preliminary step to making a determination on the alleged March interrogation, I must make a determination as to whether Geaslin engaged in protected concerted activity.

"protected." *Bethany Medical Center*, 328 NLRB 1094, 1101 (1999). The Board has held that activity is concerted if it is "engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself." *Meyers I*, supra; *Meyers II*, supra. Concerted activity also includes "circumstances where individual employees seek to initiate or to induce or to prepare for group action" and where an individual employee brings "truly group complaints to management's attention." *Meyers II*, supra at 887. An individual employee's complaint is concerted if it is a "logical outgrowth of the concerns of the group." *Every Woman's Place*, 282 NLRB 413 (1986); *Mike Yurosek & Son, Inc.*, 306 NLRB 1037, 1038 (1992), after remand, 310 NLRB 831 (1993), enfd., 53 F.3d 261 (9th Cir. 1995). In certain circumstances, the Board had found that "ostensibly individual activity may in fact be concerted activity if it directly involves the furtherance of rights which inure to the benefits of fellow employees." *Anco Insulations, Inc.*, 247 NLRB 612 (1980). Conversely, concerted activity does not include activities of a purely personal nature that do not envision group action. See *United Association of Journeymen and Apprentices of the Pipefitting Industry of the United States and Canada, Local Union 412*, 328 NLRB 1079 (1999); *Hospital of St. Raphael*, 273 NLRB 46, 47 (1984). The question of whether an employee has engaged in concerted activity is a factual one based on the totality of the circumstances. *National Specialties Installations*, 344 NLRB 191, 196 (2005). It is clear that the Act protects discussions between two or more employees concerning their terms and conditions of employment.

Geaslin engaged in protected concerted activity numerous times from March to May when she was terminated. In March, Geaslin engaged in protected concerted activity when she complained to a coworker about Respondent having the Starbucks' baristas perform bakery duties rather than their own duties, and when she initially refused to sample King Sooper's bakery products, complaining to the Assistant Manager that the Starbucks' employees had a difficult time performing the duties assigned to them as Starbucks' baristas. When Geaslin complained, she spoke as if she were speaking on behalf of Respondent's employees who work in Starbucks. She used the terms such "we" and "our" when complaining to Jackson, who is a co-worker, and Panzarella. Furthermore, although unbeknownst to her, Geaslin actually complained to the Union. Thus, Geaslin engaged in protected concerted activity since she sought group action, even if her coworkers were not aware of it, to change working conditions.

When an employee makes an attempt to enforce a collective-bargaining agreement or exercise a right established by the collective-bargaining agreement, she is acting in the interest of all employees covered by the contract. It has long been held that such activity is concerted and protected under the Act. *Interboro Contractors*, 157 NLRB 1295 (1966), enfd. 388 F.2d 497 (2d Cir. 1967). The assertion of such a right "is an extension of the concerted action that produced the agreement," and thus a single employee's invocation of that right generally affects all the employees covered by that agreement negotiated on their behalf. *NLRB v. City Disposal Systems, Inc.*, 465 U.S. 822, 829 (1984) (endorsing Board's view that employee's refusal to perform work as ordered (driving a truck in this instance) because of his honest and reasonable invocation of a contractual right is protected and concerted activity). Thus in May Geaslin engaged in protected concerted activity when she asserted her contractual rights as to whether she should be bagging groceries and also when she could take her lunch break, regardless of whether she was correct or incorrect in the basis for her assertion. See *Tillford Contractors*, 317 NLRB 68, 69 (1995) (employer unlawfully discharged union steward who argued that the presence of another employee on the jobsite violated the collective-bargaining agreement);

Kingsbury, Inc., 355 NLRB 1195 at 1204 (2010) ("It is beyond cavil that an honest and reasonable assertion of collectively bargained rights – even if … it is incorrect – is protected and concerted activity"). The complaint raised by Geaslin is considered to be grievances within the contract that affects all employees in the unit, and thus constitutes concerted activity protected by the Act.

Respondent argues that on May 9 on the store floor since Geaslin failed to use the term "contract" or "collective bargaining agreement," she did not assert a contractual right (R. Br. at 40). Even though Geaslin did not state those exact terms, when she questioned whether she should be performing bagging duties (instead of taking her lunch at that time) because she belonged to a different bargaining unit or "different Union," Geaslin asserted rights under her collective bargaining agreement. Moreover, Geaslin explained as such in the subsequent meetings with Pelo. Thus, Geaslin's actions in May can only be considered protected concerted activity.

The Act protects an employee's right to protest a contractual violation so long as this action is reasonably directed toward enforcement of a collectively bargained right. See *Frances Building Cooperative*, 327 NLRB 485 (1998). Craine testified in support of Geaslin's interpretation that although the employees at Respondent's store are represented by the Union, the various collective-bargaining agreements cover the work they are to perform. These contracts, specifically at article 1 of the meat contract and article 2 of the retail contract, do not preclude performance of other duties, but make clear what work the employees in each contract should cover. Craine also credibly testified that Pelo admitted that the Starbucks' employees should not be bagging groceries but she needed assistance on May 9. Eastburn credibly testified that it was unusual for a Starbucks' employee to be asked to bag groceries. As supported by the credible testimony of Craine and Eastburn, Geaslin asserted an honest and reasonable belief that the collective bargaining agreement precluded her from performing bagging duties. It is irrelevant that the Union has yet to file a grievance over the assignment of duties as Geaslin protested.

Furthermore, at the May 14 meeting, Geaslin continued to assert her contractual rights when she insisted that she agreed to bag groceries and merely questioned whether such an assignment was appropriate under the contract. I agree with the General Counsel that the May 14 meeting also constitutes a "grievance" meeting since Geaslin and her representative met with Respondent's managers to discuss her discipline from the week prior. Furthermore, the May 21 meeting was considered a first step grievance meeting under the meat contract. Thus, both meetings constitute protected concerted activity under the Act.

In support of its argument that Geaslin was not engaged in protected concerted activity Respondent cites to *ABF Freight Systems*, 271 NLRB No. 6 (1984).[26] In *ABF Freight Systems*, a truck driver had a history of rejecting trucks to drive for alleged safety or equipment violations

[26] Respondent also argues that my decision in *SB Tolleson Lodging, LLC*, 2015 WL 1539767 (April 7, 2015), parallels the facts in this case. In *SB Tolleson*, which has no precedential value since it was not appealed to the Board, the discriminatee complained about how her manager treated her. The discriminatee's complaint focused solely on herself as I found. Thus, the facts are not similar.

four times more than any other driver. Thus the company decided to send all the truck driver's trucks to be driven to the auto shop for inspection before being assigned to him. Even after these inspections and subsequent inspections, the truck driver refused to drive. The company discharged the truck driver. The Board held that the evidence, taken as whole, indicates that the truck driver did not act reasonably and honestly when invoking a contractual right but was "obstructively raising petty and/or unfounded complaints." *ABF Freight Systems*, supra, slip op. at 3. The truck driver's opinion was contrary to the opinion of others including other drivers, mechanics and the Union's business agent. Thus, the truck driver's refusal to drive was neither concerted nor protected under the Act.

The facts set forth in this case do not mirror the facts found in *ABF Freight Systems*. Geaslin raised the issue of whether certain duties should be performed by baristas in the Starbucks two times in March and one time in May. The evidence does not show that Geaslin is a chronic complainer as the truck driver in *ABF Freight Systems*. Rather Geaslin raised her questions but ultimately performed or attempted to perform the tasks. As explained previously, Geaslin's belief was also supported by several other employees as well as Pelo based on Craine's credited testimony.

In sum, I agree with the General Counsel that all times at issue in March and May, Geaslin engaged in concerted activity protected by the Act.

D. Pelo Interrogated Geaslin in March 2014

The General Counsel alleges that in March Pelo interrogated Geaslin about speaking to the Union when she complained about having to sample King Soopers' bakery items thereby violating Section 8(a)(1) of the Act (GC Br. at 17–18). Respondent disagrees, alleging that Pelo never questioned Geaslin about going to the Union, and even if it were determined that Pelo questioned Geaslin in such manner, this interrogation was not improper (R. Br at 48–50).

Questioning of employees is not automatically unlawful. The Board considers the totality of the circumstances in determining whether the questioning of an employee constitutes an unlawful interrogation. *Rossmore House Hotel*, 269 NLRB 1176 (1984), affd. sub nom. *Hotel & Restaurant Employees Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985) (the Board set forth a test for examining whether an interrogation is unlawful); *Stoody Co.*, 320 NLRB No. 1, slip op. at 1 (1995) (the Board considers background, nature of information sought, and method of interrogation). The test is an objective one that does not rely on the subjective aspect of whether the employee was, in fact, intimidated. *Multi-Ad Services*, 331 NLRB 1226, 1227–1228 (2000), enfd. 255 F.3d 363 (7th Cir. 2001). The Board seeks to determine whether under all the circumstances the questioning at issue would reasonably tend to coerce the employee at whom it was directed so that she would feel restrained from exercising rights protected by Section 7 of the Act. *Westwood Health Care Center*, 330 NLRB 935, 941 (2000). The Board has also found that questioning an employee about her protected concerted activity may constitute an unlawful interrogation. See *Century Restaurant & Buffet, Inc.*, 358 NLRB No. 23, slip op. at 28.

As set forth in the findings of facts and credibility determination, Pelo approached and questioned Geaslin, perhaps rhetorically, on whether she complained to the Union about being required to sample bakery items for Respondent. Geaslin legitimately denied complaining to the

Union because she did not realize that Jackson was a union steward. However, during the conversation with Pelo, when Geaslin denied complaining to the Union, Pelo told her she was not telling truth, and expressed her displeasure that Geaslin spoke to the Union. How Geaslin felt in response to this question by Pelo is irrelevant. Rather objectively, would such a question restrain an employee from pursuing her Section 7 rights, which in this case are to seek union assistance for workplace and contractual questions.

I find that Pelo unlawfully interrogated Geaslin when she questioned whether she went to the Union. Pelo's question, even in isolation, was unlawful since she told Geaslin she was displeased that she went to the Union. Moreover, Pelo knew that Geaslin complained to Jackson so asking Geaslin whether she went to the Union had no other intention but to make Geaslin think twice about complaining to the Union. The context in which this question was asked further supports the coercive nature of Pelo's question. In March, Geaslin complained to her co-worker about the inability to manage the workload in the Starbucks' kiosk while being asked to perform work for the bakery department. That same month, it appears that Panzarella asked Geaslin to sample bakery products, and she initially refused alleging the same workload problem. Thus during the month of March Geaslin actively questioned the propriety of such duties, and complained to her co-worker who was also union steward. Eventually, Pelo learned of Geaslin's questioning when Panzarella told her that Jackson approached her to discuss the issue of sampling bakery items.

Pelo's question to Geaslin of whether she complained to the Union about sampling the bakery items, in isolation and with such context, is unlawful. Under the totality of the circumstances in this case, Pelo's conduct was coercive and sought information from Geaslin about her protected concerted activity. Hence, I find that Respondent violated Section 8(a)(1) of the Act.

E. Respondent Discriminatorily Twice Suspended and Terminated Geaslin

The General Counsel alleges that Respondent violated Section 8(a)(3) and (1) of the Act when it twice suspended Geaslin for 5 days and when it terminated her after she asserted her rights to enforce the collective bargaining agreement. Respondent argues that Geaslin's behavior lost the protection of the Act, and Geaslin was terminated for insubordination, not for any alleged protected concerted activity. As set forth below, I find that Geaslin was terminated for engaging in protected concerted activity, and that her actions on May 9 and 14 did not lose the protection of the Act.

An employee's discipline violates Section 8(a)(1) of the Act, without regard to an employer's motive, and without regard to a showing of animus, where "the very conduct for which [the] employee [is] disciplined is itself protected concerted activity." *Burnup & Sims, Inc.*, 256 NLRB 965, 976 (1981). Furthermore, when an employee is disciplined for conduct that is part of the res gestae of protected concerted activities, "the pertinent question is whether the conduct is sufficiently egregious to remove it from the protection of the Act." *Stanford NY, LLC*, 344 NLRB 558 (2005); *Aluminum Co. of America*, 338 NLRB 20 (2002).

In this case, the credited evidence shows that around the time Pelo called for assistance for bagging groceries on May 9, Geaslin left the Starbucks' kiosk to take her lunch break, albeit

later than the time period stated in the collective-bargaining agreement. Despite seeking to take her lunch break later than the middle of her shift (for which she had been previously disciplined), Geaslin sought to take a lunch break before the end of her shift (for which she had been previously disciplined). When Geaslin reached Pelo, a disagreement ensued between the two. Pelo needed Geaslin to bag groceries before taking her lunch break, and Geaslin questioned the propriety of such a task. Geaslin and Pelo continued to disagree briefly, and then Geaslin turned toward the check stands to bag groceries. As she turned and walked toward the check stands, Geaslin raised her arms in the air in frustration and said that all she was asking was about her lunch. Pelo then called Geaslin back to talk with her, before Geaslin began bagging groceries. Both Pelo and Geaslin's voices were raised and loud enough such that Eastburn could hear them talking over the customers gathered to check out of the store.

Pelo and Geaslin, along with Eastburn who witnessed a portion of the exchange, continued the discussion in the manager's office. Pelo accused Geaslin of refusing to bag groceries, and Geaslin consistently stated that she did not refuse to bag groceries but merely inquired as to whether the collective-bargaining agreement permitted her to perform such a task. Both Pelo and Geaslin's voices were raised, and Geaslin admitted to being agitated. After Pelo suspended Geaslin for 5 days, Geaslin, in an expression of frustration, mimicked a baby's cry out loud. Overall, as set forth above, Geaslin credibly attempted to bag groceries but was thwarted in her attempt when Pelo called her back to continue the discussion after Geaslin raised her arms in the air in frustration. It is true that Geaslin did not verbally agree to bag groceries, but she also did not refuse the task. Geaslin's movement toward the check stands shows that she sought to perform the task Pelo asked her to do.

Geaslin's actions on May 9 are similar to the events which occurred in March. At that time, Panzarella asked Geaslin to sample Respondent's bakery items. Geaslin initially refused, questioning why she should perform the task requested when she had her own Starbucks' duties to perform. Geaslin eventually sampled the bakery items. At that time, Panzarella did not discipline Geaslin for initially refusing. Likewise, it is unlikely that Geaslin refused Pelo's directive in May. Thus, I find that Geaslin was suspended on May 9 for asserting her contractual rights.

Thereafter, during the May 14 meeting, Geaslin along with Craine continued to disagree with Pelo's version of events on May 9. Geaslin insisted that she tried to bag groceries but could not when Pelo called her back over to talk with her. Pelo disagreed with Geaslin's version of events. Eventually, Pelo suspended and terminated Geaslin for "gross misconduct" during the May 14 meeting. Geaslin had a short history of questioning the legality or appropriateness of performing certain duties but never refused to perform those duties. Pelo punished her for questioning whether the contract permitted such action and when Geaslin would not acquiesce in the manner she felt appropriate (being "obstinate" as stated in the termination paperwork) she suspended and terminated Geaslin. The events of the May 14 meeting are inextricably intertwined with the events of May 9. Thus, I find that Pelo suspended and terminated Geaslin during the May 14 and 21 meeting for asserting her contractual rights.

Respondent discharged Geaslin for "gross misconduct" or insubordination. However, the Board distinguishes between true insubordination and behavior that is only disrespectful, rude, and defiant. *Goya Foods, Inc.*, 356 NLRB No. 73, slip op. at 4 (2011), citing *Severance Tool*

Industries, 301 NLRB 1166, 1170 (1991), enfd. mem 953 F.2d 1384 (6th Cir. 1992). In *Goya Foods*, an employee who initially refused a supervisor's instruction to punch out and go home, but then complied, was found to have engaged in disrespectful, rude, and defiant behavior, and thus, to fall under the Act's protection. Id. Similarly, Geaslin initially disagreed with Pelo's assignment of the task of bagging groceries but then attempted to perform the task assigned.[27] In subsequent meetings, Geaslin continued to disagree with Pelo's characterization of events on May 9. The credited evidence shows that neither on the store floor on May 9 nor in the meetings on May 9 and 14 in the management office did Geaslin yell, use profanity or utter threats. Thus, I find that Geaslin's behavior was not truly insubordinate and that her initial disagreement to the task of bagging groceries did not remove her from the Act's protection.

Where, as here, the conduct arises from protected activity, the Board does not consider such conduct as a separate and independent basis for discipline. See *Tampa Tribune*, 351 NLRB 1324, 1326 fn. 14 (2007), enf. denied on other rounds sub nom. *Media General Operations, Inc., v. NLRB*, 560 F.3d 181 (4th Cir. 2009). However, the "fact that an activity is concerted … does not necessarily mean that an employee can engage in the activity with impunity." *NLRB v. City Disposal Systems, Inc.*, supra at 837. "[T]here is a point when even activity ordinarily protected by Section 7 of the Act is conducted in such a manner that it becomes deprived of protection that it otherwise would enjoy." *Indian Hills Care Center*, 321 NLRB 144, 151 (1996).

An employees' "right to engage in concerted activity permits some leeway for impulsive behavior, which must be balanced against the employer's right to maintain order and respect. Where the conduct occurs in the course of protected activity, the protection is not lost unless the impropriety is egregious." *Coors Container Co.*, 238 NLRB 1312, 1320 (1978), enfd. 628 F.2d 1283 (10th Cir. 1980). In order for an employee engaged in such activity to forfeit her Section 7 protection her misconduct must be so "flagrant, violent, or extreme" as to render her unfit for further service. *United Cable Television Corp.*, 299 NLRB 130 (1990), quoting *Dreis & Krump Mfg.*, 221 NLRB 309, 315 (1975), enfd. 544 F.2d 320 (7th Cir. 1976). The Board will not find that an employee's "disrespectful, rude, and defiant demeanor and the use of a vulgar word" loses the protected of the Act while engaged in concerted activity despite the employer's characterization of the employee's conduct as "insubordinate, belligerent, and threatening." *Severance Tool Industries*, 301 NLRB 1166, 1170 (1991).

To determine whether an employee who is otherwise engaged in protected activity loses the protection of the Act due to opprobrious conduct, the Board considers the following factors which must be carefully balanced: (1) the place of the discussion; (2) the subject matter of the

[27] Respondent argues that Geaslin violated the meat contract, Art. 44, Sec. 121, when she engaged in a work stoppage by refusing to bag groceries (R. Br. at 35–36). As established by the credited evidence, Geaslin did not refuse to bag groceries. Geaslin attempted to bag the groceries but before she could begin the task was called back to talk with Pelo. Even if Geaslin's action of initially questioning whether she should be bagging groceries, rather than taking her overdue lunch, is considered a work stoppage, the Board has held that on-the-job work stoppages of significantly longer duration remain protected. *Crowne Plaza LaGuardia*, 357 NLRB No. 95, slip op. at 6 (2011), citing *Los Angeles Airport Hilton Hotel & Towers*, 354 NLRB 202, 202 fn. 8, and 11 (2009), adopted by 355 NLRB 602 (2010) (no loss of protection for 2-hour work stoppage that did not interfere with hotel's operations); *Goya Foods*, supra, 356 NLRB No. 72, slip op. at 3 (after only a few minutes employee followed supervisor's instruction to punch out and go home). Thus, Geaslin's conduct remains protected by the Act.

discussion; (3) the nature of the employee's outburst; and (4) whether the outburst was, in any way, provoked by an employer's unfair labor practice. *Atlantic Steel*, 245 NLRB 814, 816 (1979).[28] Contrary to Respondent's contention that Geaslin's behavior lost the protection of the Act, I find that the *Atlantic Steel* factors weigh in favor of Geaslin not forfeiting protection of the Act.

(1) The place of the discussion

The first factor, the place of the discussion, ultimately favors protection in the circumstances of this case. On May 9 the discussion between Pelo and Geaslin occurred on the store floor and the manager's office. First, they began their dispute on the busy store floor; although Geaslin raised her voice, she did not yell. Furthermore, there is no evidence that there were any customer complaints. However, Eastburn testified that the dispute was at a sufficient volume that she could hear both Pelo and Geaslin. This portion of the discussion was not private, which could weigh against protection. Compare *Goya Foods of Florida*, 347 NLRB No. 103 (2006) (Board upheld administrative law judge decision finding that less than one minute of loud shouting by union leaders in a grocery store was not misconduct so egregious to lose the protection of the Act). However, before the discussion became noticeable to the customers and other employees, Geaslin, not Pelo, suggested they continue their discussion in the manager's office. Thereafter, Geaslin and Pelo, along with Eastburn who was asked to accompany them by Pelo, continued their discussion in the manager's office. This portion of the discussion was

[28] Respondent provides an alternate analysis under *Wright Line*, 251 NLRB 1083, 1089 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). However, the *Wright Line* analysis is not appropriate in this case. Respondent suspended and terminated Geaslin for "gross misconduct" or insubordination for her behavior during the May 14 meeting after she questioned her duties under her contract on May 9. Thus, Geaslin's suspensions and termination are inextricably intertwined with her engagement in protected concerted activity, and a *Wright Line* analysis is inapplicable. See *Aluminum Co. of America*, 338 NLRB 20, 22 (2002) (dual-motive analysis inappropriate where there was a causal connection between alleged protected activity and resulting discipline). Even under the burden-shifting framework of *Wright Line*, Respondent's suspensions and termination of Geaslin violates the Act. The General Counsel has met her initial burden under the *Wright Line* test. As set forth above, Geaslin engaged in protected and concerted activity, and Pelo was well aware of such activity (i.e., when Geaslin questioned whether bagging duties were appropriate for her to perform instead of taking her lunch break). Thus, the General Counsel has established that Geaslin engaged in protected concerted activity, and Respondent was aware of such. As for motivation, Respondent suspended Geaslin for refusing to bag groceries. The credited evidence shows Geaslin did not refuse to bag groceries but rather questioned the propriety of such a task. At the follow up meeting, Pelo suspended Geaslin again for her conduct and behavior during the May 14 meeting when Geaslin insisted she tried to perform the task. Subsequently, Pelo terminated Geaslin for her behavior during the May 14 meeting. Pelo previously confronted Geaslin about speaking to the Union about performing tasks she did not feel was appropriate. Thus, although Pelo did not initially seek to terminate Geaslin, Pelo did not appreciate the vigor and obstinance with which Geaslin defended herself. Thus, Pelo's motivation to twice suspend and terminate Geaslin was due to her protected concerted activity. The General Counsel has met its initial burden of persuasion under *Wright Line*. Respondent failed to sustain its burden of proof by failing to provide any evidence, other than anecdotal evidence that other employees have been suspended or terminated for engaging in similar conduct absent protected concerted activity. Thus, even under right *Wright Line*, Respondent illegally suspended and terminated Geaslin.

private, out of the earshot of employees (other than Eastburn who was invited by Pelo) and customers. Thus, this portion of the discussion weighs in favor of protection.

The same can be said for the meeting on May 14. That meeting occurred in the manager's office with the presence of Pelo and two other managers, who are not considered employees under the Act, along with Geaslin and Craine. There is no evidence that anyone else heard the discussion, and even when Craine took Geaslin to the break room, there is no evidence that Geaslin and Craine's discussion was overheard by other employees. Thus, overall, this factor favors protection under the Act.

Respondent argues that after Geaslin was suspended on May 9, she mocked Pelo's authority by mimicking a crying baby "as she walked down the hall" thereby causing others to potentially hear her (R. Br at 28). Respondent also argues that because Geaslin acted in an insubordinate manner in front of Eastburn and the other managers, this factor weighs in favor of losing protection under the Act. I do not agree with Respondent's argument. First, even if other employees heard Geaslin's mimicking baby cry, she had already been suspended, and her termination was based on her "gross misconduct" during the May 14 meeting, not her conduct during the May 9 meeting. Furthermore, *Atlantic Steel* and its progeny focus, in part, on whether other employees heard and observed the alleged inappropriate conduct. Such conduct when observed could affect workplace discipline or undermine Pelo's authority. Here, Eastburn and the two managers observed the conduct during a meeting in the manager's office to discuss whether Geaslin refused a direct order and to discuss that incident. The circumstances surrounding such a situation would be reasonably contentious, and these individuals were there as witnesses, not coworkers merely observing.

Respondent cites to another non-precedential decision to support its decision. In *King Soopers, Inc.*, 2001 WL 1598704 (2001), an administrative law judge held that under the factual scenario presented the employee's conduct which occurred in the area of the check stands and could have possibly been heard by customers was an *Atlantic Steel* factor which weighed against protection. In that case, the entire conduct in question occurred on the store floor rather than in this instance where Geaslin and Pelo spent only a short time on the store floor engaged in disagreement. They then moved to the manager's office where the May 9 meeting was held as well as the subsequent meeting. Thus, the factual scenario presented here is not analogous to that found in *King Soopers*, and does not support a loss of protection of the Act.

In sum, I find this factor weighs in favor of protection for Geaslin's conduct on May 9 and 14.

(2) The subject matter of the discussion

The second factor, the subject matter of the discussion, favors protection. At the heart of the May 9 incident on the store floor and the May 9 meeting in the manager's office was Geaslin's assertion of her collective bargaining rights. Geaslin reasonably interpreted the contract which applied to her as limiting her duties to her work in the Starbucks' kiosk. Ultimately, the credited evidence shows that Geaslin attempted to bag groceries despite her initial disagreement. The May 14 meeting was a continuation of the discussion on May 9. Pelo sought to ensure that Geaslin understood that she needed to perform the duties assigned to her,

and Geaslin disagreed with Pelo's characterization of the events on May 9. See *Crown Central Petroleum Corp.*, 177 NLRB No. 29 (1969) (during a grievance meeting, the veracity of management was at the primary issue and as such frank and not always complimentary views must be expected and permitted), citing *Bettcher Manufacturing Corp.*, 76 NLRB 526, 527 (1948). Thus, Geaslin's expression of her opinion on her duties per her interpretation of the collective bargaining agreement is a fundamental Section 7 right.

Although Respondent disagrees with Geaslin's interpretation of the contract, it may not rely upon the Union's lack of grievance filing on the subject matter as a valid excuse to discipline Geaslin for asserting her Section 7 rights. Respondent also argues that Geaslin did not discuss the basis for her belief that the contract precluded her from bagging groceries. This argument has no basis; during the May 9 and 14 meetings, Geaslin initially questioned the legitimacy of the task but then sought to perform the tasks. The meetings were not to discuss the validity of Geaslin's claim under the collective-bargaining agreement, but the validity of Geaslin and Pelo's claims about the bagging duties Geaslin was asked to perform. Respondent also appears to claim that Geaslin's actions after she was suspended on May 9, when she mockingly cried like a baby, was not protected conduct. This argument is irrelevant since Pelo never claimed to discipline Geaslin for her immediate behavior after she was suspended on May 9.

Overall, the nature of the subject matter weighs in favor of protection of Geaslin's behavior and conduct on May 9 and 14.

(3) The nature of the outburst

The third factor, the nature of the outburst, favors protection as well. During May 9 discussion on the store floor, Geaslin did not use intemperate language, profanity, or threats but admitted to raising her voice. Thereafter, during the May 9 meeting in the manager's office, Geaslin's voice was raised, and she was agitated but again she did not yell, use profanity or threaten Pelo. Furthermore, during the May 14 meeting, it appears Geaslin became more agitated at this meeting than the events of May 9. During this meeting, the credited evidence shows that after Pelo began the meeting by insisting that Geaslin refused to bag groceries, Geaslin raised her voice, raised her arms in the air, and made facial expressions of disbelief towards Pelo. As the meeting progressed, Geaslin became more agitated with her tone of voice becoming louder; Geaslin also gestured frequently with her hands but was not physically leaning toward Pelo. "The Board has repeatedly held that merely speaking loudly or raising one's voice in the course of protected activity generally does not warrant a forfeiture of the Act's protection." *Crowne Plaza LaGuardia*, 357 NLRB No. 95, slip op. at 5 (2011); see *Goya Foods*, 356 NLRB No. 73, slip op. at 3. Likewise, Geaslin's conduct on May 9 and 14 do not forfeit the protection of the Act.

In sharp contrast, Pelo, Panzarella and Barbos all testified, with variations, that Geaslin was making faces at Pelo and lunging at her with her face turning red, clenching her teeth. I have discredited the testimony of Pelo, Panzarella and Barbos on the issue of Geaslin's behavior during the May 14 meeting for the reasons explained above, but even crediting such testimony, Geaslin's behavior would not lose the protection of the Act. The Board has held that an employee's deliberate physical contact to restrain a manager during the course of protected concerted activity loses the protection of the Act. See *Crowne Plaza LaGuardia*, supra, slip op.

at 6 (employees lose protection of the Act when attempting to restrain a manager). In contrast, in *Kiewitt Power Constructors Co.*, 355 NLRB No. 150, slip op. at 3 (2010), enfd. 652 F.3d 22 (2011), an employee did not lose protection of the Act despite angrily telling his supervisor that things could get "ugly" and he "better bring [his] boxing gloves." Geaslin's behavior falls well short of these two examples, even crediting the testimony of Respondent's witnesses. Furthermore, I find it significant that despite Geaslin's alleged behavior, none of the managers called security to escort Geaslin from the office on May 14 or on 21 when they gave her the termination paperwork.[29]

The Board has generally found that an employee's behavior loses the protection of the Act when engaged in egregious behavior, not the "mild" behavior displayed by Geaslin. Compare, e.g., *Waste Management of Arizona*, 345 NLRB 1339 (2005) (employee used profanity repeatedly and loudly before coworkers and other witnesses, refused to move the discussion to a private location, threatened the supervisor and refused to follow orders, losing protection of the Act); *Starbucks Coffee Co.*, 354 NLRB 876 (2009) (employee participated with group of people following employer's regional vice president at night after a union rally, shouting threats, taunts and profane comments at him, losing protection of the Act).

Respondent cites two cases in support of its position that Geaslin's conduct under this *Atlantic Steel* factor loses the protection of the Act. Neither case supports Respondent's argument. In *The Mead Corp.*, 331 NLRB No. 66 (2000), the Board upheld an administrative law judge decision finding that a union steward lost the protection of the Act when, in the presence of another manager and three employees, a union steward verbally attacked the supervisor with personal remarks and refused to leave the meeting. Geaslin's conduct does not compare to the conduct by the union steward in *The Mead Corp.*, and is distinguishable. For example, Geaslin did not verbally attack Pelo; she simply insisted that she attempted to bag groceries and became agitated and visibly upset when Pelo continued to mislead the participants in the room.

Respondent also cites to *Richmond District Neighborhood Center*, 361 NLRB No. 74 (2014). Again, that decision is distinguishable. In *Richmond District Neighborhood Center*, the Board found that the employer did not violation the Act when it rescinded two employees' rehire letters after discovering a Facebook conversation between the two employees which contained an extensive and detailed discussion concerning advocacy of insubordination. The Board, which did not decide the appropriateness of the *Atlantic Steel* test for analyzing a private Facebook conversation, determined that the "pervasive advocacy of insubordination in the Facebook posts, comprise of numerous detailed descriptions of specific insubordinate acts, constituted conduct objectively so egregious as to lose the Act's protection." Id., slip op. at 3. The Board did not rely on employees' use of profanity or disparaging remarks about the employer's administrative personnel and managers. In contrast, Geaslin's questioning on May 9 of the bagging task, and her subsequent disagreement with Pelo's version of events do not compare with the actions of the two employees in *Richmond District Neighborhood Center*. Geaslin did not look to create a work stoppage, undermine leadership, neglect her duties or jeopardize the future of Store #1.

[29] Pelo, Panzarella, and Barbos' testimony regarding their concerns about Geaslin's behavior is not relevant. The Board uses an objective standard, rather than a subjective standard, to determine whether the conduct in question is threatening. *Plaza Auto Center, Inc.*, 360 NLRB No. 117, slip op. at 5 (2014).

Geaslin did not verbally attack any of her managers either on the store floor or in the privacy of the manager's office. She merely questioned the propriety of the task, and then sought to defend herself when faced with discipline. Thus, Geaslin's behavior on May 9 and 14 weighs in favor of protection under the Act.

(4) Provocation by Respondent

The fourth factor, provocation by Respondent, weighs in favor of protection under the Act. Here, Pelo continued to misrepresent Geaslin's actions on May 9. In response, Geaslin disagreed with Pelo, explaining her attempt to bag the groceries, and explaining that she only questioned whether such as task was appropriate considering her "union." Pelo, not approving of Geaslin's explanation, suspended her that day.

The following week, Pelo testified credibly that she had no intention of terminating Geaslin but for her behavior during the May 14 meeting. Again, during this meeting, Pelo insisted that Geaslin refused to bag groceries, and that Pelo must follow what she directs since she is her supervisor. Geaslin, surprised by Pelo's version of events on May 9, became visibly upset, making facial expressions; Geaslin interrupted Pelo and became agitated. Geaslin insisted that she attempted to bag groceries but did not actual bag the groceries because Pelo called her back to speak with her. It is clear that Pelo provoked Geaslin's outburst which stems from an assertion by Geaslin of her protected concerted rights. Thus, this factor weighs in favor of protection under the Act

In sum, I find that Geaslin's actions on May 9 and 14 were not so opprobrious as to warrant the loss of the Act's protection. Thus, because her actions were protected on May 9 and 14, Respondent violated Section 8(a)(3) and (1) of the Act when it twice suspended and discharged Geaslin.

CONCLUSIONS OF LAW

1. By interrogating, twice suspending, and terminating Geaslin, Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. By interrogating Geaslin, Respondent violated Section 8(a)(1) of the Act.

3. By suspending Geaslin on May 9, Respondent violated Section 8(a)(3) and (1) of the Act.

4. By suspending Geaslin on May 14, Respondent violated Section 8(a)(3) and (1) of the Act.

5. By terminating Geaslin on May 21, Respondent violated Section 8(a)(3) and (1) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I shall order it to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

Having interrogated an employee about union activity, Respondent will be ordered to cease and desist from this action.

Respondent, having discriminatorily twice suspended and terminated an employee, must offer her reinstatement and make her whole for any loss of earnings and other benefits. As discussed above, the General Counsel requests that Geaslin be reimbursed for "all search-for-work and work-related expenses regardless of whether the discriminatee received interim earnings in excess of these expenses, or at all, during any given quarter, or during the overall backpay period" (GC Exh. 1(ee)). I cannot authorize such a remedy, such approval lays with the Board. Backpay shall be computed in accordance with *F. W. Woolworth Co*., 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center,* 356 NLRB No. 8 (2010), enf. denied on other grounds sub. nom., *Jackson Hospital Corp. v. NLRB*, 647 F.3d 1137 (D.C. Cir. 2011).

Respondent shall file a report with the Social Security Administration allocating backpay to the appropriate calendar quarters. Respondent shall also compensate the discriminatee for the adverse tax consequences, if any, of receiving one or more lump-sum backpay awards covering periods longer than 1 year, *Don Chavas, LLC d/b/a Tortillas Don Chavas*, 361 NLRB No. 10 (2014).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[30]

ORDER

Respondent King Soopers, Inc., Denver, Colorado, its officers, agents, successors, and assigns, shall

1. Cease and desist from

   a. Coercively interrogating an employee about her union activity.

   b. Suspending twice and terminating an employee because she questioned her work duties under the collective-bargaining agreement.

[30] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

a. Within 14 days from the date of the Board's Order, offer Wendy Geaslin full reinstatement to her former job or, if the job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

b. Make Wendy Geaslin whole for any loss of earnings and other benefits suffered as a result of the discrimination against her, in the manner set forth in the remedy section of the decision.

c. Within 14 days from the date of the Board's Order, remove from its files any reference to the unlawful discharge and two 5-day suspensions, and within 3 days thereafter notify the employee in writing that this has been done and that the discharge and two 5-day suspensions will not be used against her in any way.

d. Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

e. Within 14 days after service by the Region, post at its Store #1 in Denver, Colorado, copies of the attached notice marked "Appendix."[31] Copies of the notice, on forms provided by the Regional Director for Region 27, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its

31 If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since March 1, 2014.

f. Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. October 22, 2015

Amita Baman Tracy
Administrative Law Judge

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities.

WE WILL NOT suspend or terminate or otherwise discriminate against any of you when questioning your work duties under the collective-bargaining agreement.

WE WILL NOT coercively question you about your union activities.

WE WILL NOT in any other manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of this Order, offer Wendy Geaslin full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

WE WILL make Wendy Geaslin whole for any loss of earnings and other benefits resulting from her two 5-day suspension and termination, less any net interim earnings, plus interest compounded daily.

WE WILL file a report with the Social Security Administration allocating backpay to the appropriate calendar quarters.

WE WILL compensate Wendy Geaslin for the adverse tax consequences, if any, of receiving one or more lump-sum backpay awards covering periods longer than 1 year.

WE WILL, within 14 days from the date of this Order, remove from our files any reference to the two unlawful 5-day suspensions and unlawful termination of Wendy Geaslin, and WE WILL, within 3 days thereafter, notify her in writing that this has been done and that the two 5-day suspensions and termination will not be used against her in any way.

KING SOOPERS, INC.

(Employer)

Dated _____ By _____

(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

600 17th Street, 7th Floor, North Tower, Denver, CO 80202-5433

(303) 844-3551, Hours: 8:30 a.m. to 5 p.m.

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/27-CA-129598 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (303) 844-6647.